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In the

Supreme Court of the United States

OCTOBER TERM 1988

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., and PATRICK BURNS,
Petitioners,

against

ROBERT HUGHES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Nature of the Petition 1

Statement of the Case 2

POINT I—The petition for writ of certiorari fails to raise a substantial question and in any event the courts below properly retained jurisdiction where the federal claim was paramount and where success on the federal claim is not the criterion for retaining jurisdiction 8

POINT II—Petitioners in a futile attempt to invoke the jurisdiction of this Court now for the first time on this appeal miscast this action as being governed by the Norris-LaGuardia Act 12

POINT III—The jury's assessment of damages was proper and reasonable and all awards have substantial compelling foundation in the record 14

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984), *modified* 748 F.2d 69 12

Ellis v. Dixon, 349 U.S. 458 (1955) 12

Helvering v. Johnson, 104 F.2d 140, *aff'd* 308 U.S. 523 (1939) 15

Lavender v. Kurn, 327 U.S. 645 (1946) 14

Moore v. N.Y. Cotton Exchange, 270 U.S. 593 (1926) 10

Remington Rand Inc. v. Societe International Pour Participation Industrielles et Commerciales, S.A., 188 F.2d 1011, *cert. den.* 342 U.S. 832 (1957), *rehearing den.* 342 U.S. 889 15

Rice v. Sioux City Memorial Park Cemetery Inc., 349 U.S. 70 (1955) 8

Rosado v. Wyman, 397 U.S. 397 (1970) 11

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1965) 11

Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) 6

Federal Statutes:

28 U.S.C. Section 1331 2

28 U.S.C. Section 1343 2

28 U.S.C. Section 106 12

42 U.S.C. Section 1983 ..... 1, 2, 9, 10

Miscellaneous:

S. Ct. Rule 17.1 8

Federal Rules in Civil Procedure, Rule 12(b)(6) 2

Labor Management Relations Act Section 303 11

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Nature of the Petition

On six prior occasions the district court and the circuit court have been requested to consider petitioners' main argument—that there is no, and never was federal jurisdiction to entertain this action. On each occasion those individual courts categorically rejected that argument. Now, for the seventh time this identical argument is once again being asserted. Once again, it should be rejected out of hand.

As a matter of fact throughout the present application, one of the main, if not the primary thrust of petitioners' argument is that, since the jury determined that they and the Police Department of the City of New York were not liable to respondent on his section 1983 cause of action,

this fact demonstrates that federal jurisdiction was lacking *ab initio*. In dispatching this argument, Circuit Judge Cardamone, in writing for a unanimous panel, held:

> "Plainly, a federal claim need not be one guaranteed to succeed to gain entrance to a federal forum. In fact, appellants' argument that appellee's Section 1983 cause of action is jurisdictionally defective because of a negative jury verdict itself borders on being frivolous." (10b).[1]

Petitioners are not deterred by this admonition, and again assert this frivolous argument.

Furthermore, the remainder of petitioners' arguments center on disputing affirmed findings of fact, and in effect, request that this Court now invade the province of the jury. Certainly, this is not the function of this Court. Lastly, petitioners assert certain arguments that are being advanced for the first time on this appeal—once again engaging in a practice not favored.

Statement of the Case

Notwithstanding the contentions of petitioners to the contrary, the district court, in denying petitioners' pre-trial motion to dismiss made pursuant to Rule 12(b)(6), "ruled that the complaint pleaded factual allegations which undoubtedly raise a claim pursuant to Section 1983 such that the Court's jurisdiction rested either on Section 1331 or Section 1343 (jurisdiction over federal civil rights actions (5b)." The circuit court affirmed this determination and found that "viewing the complaint on its face, it alleged facts sufficient to establish . . . a violation of Section 1983 (9b)."

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[1] Numbers followed by a letter designation will refer to the page of Petitioners' Appendix to the Petition for Writ of Certiorari. All other numeric references will be to the official court reporter's trial transcript.

The facts alleged in the complaint and proven at the trial of this matter clearly and unequivocally demonstrated that petitioners "maliciously and deliberately destroyed" (6b) Robert Hughes' police career by embarking on a vendetta "aimed at securing revenge" (4b). In addition at the outset it must be pointed out that throughout this application petitioners gloss over a prime allegation in the pleadings, and what was attempted to be proved at trial by a substantial amount of testimony, that the City of New York Police Department and petitioners engaged in the conspiracy to bring about the downfall of Robert Hughes.

The facts proven at trial are adequately and fairly summarized by the circuit court in its unanimous opinion which is printed in this petition at pages 1b-16b. Rather than repeat entirely these facts, we simply incorporate those facts and highlight certain others to correct any misunderstanding created by the Petition for Writ of Certiorari.

The conspiracy theory was predicated on allegations that the New York City Police Department, the only state actor, conspired with petitioners, private parties. This agreement between these parties constituted "joint activity considered to be state action by all parties involved" (8b).

Circuit Judge Cardamone wrote:

> "Hughes alleged that the PBA and Burns conspired with Hughes' commanding officers in the Police Department to cause the loss of his position in the Health Services Division. The complaint further alleged that the PBA and Burns—with the knowledge and express or implied consent of the Police Department—hired private investigators and placed Hughes under surveillance in violation of his constitutional rights. In an allegation directed solely at the

> Police Department, the complaint asserted that the Department's Internal Affairs Division—through its knowledge and inactivity concerning the campaign of harassment directed at Hughes—violated his rights. Moreover, appellee alleged that the Police Department demanded that he voluntarily request a transfer before it unilaterally transferred him." (8b).

Petitioners now assert at page 9 of this petition that the private investigators, Henry Branche and Walter Cox were retained by the law firm of Richard Hartman. Incidentally this firm is on a retainer by the PBA and the work performed for the PBA accounts for 60 to 70% of all matters of this firm (525). In any event hired investigator Branche, a twenty-three year member of the New York City Police Department, now retired, testified that his surveillance of Robert Hughes was "an overly long investigation" (873). Moreover this same witness acknowledged that the assignment was given to him by the First Vice-President of the PBA, petitioner Patrick Burns (882-883). Furthermore as to investigator Cox, he had been employed by the PBA's attorneys before and after the Robert Hughes investigation for a total of eight or nine years (254, 260). Stated simply, the argument of petitioners is not borne out by the record.

Turning then to another misconception, petitioners essentially assert that there was insufficient evidence to support the jury's findings that appellants harassed Robert Hughes and caused him to be involuntarily transferred out of his assignment. Petitioners in turn assail the label of "Dr. Death" which was placed on Robert Hughes by petitioners.

At the trial the jury was confronted with conflicting evidence on this issue. Yet, it was strictly within the province of the jury to make this determination provided there is support in the record. This same argument was

previously raised, and the circuit court affirmed the jury's finding noting that:

> "As a result of appellants' campaign of harassment and the false dissemination to Hughes' fellow officers that Sergeant Hughes was responsible for Troia's suicide, many referred to Hughes as "Dr. Death." Hughes claimed that appellants' tactics resulted in harassment of him and his wife, caused him to be involuntarily transferred, discussed below, and denied him the promotion and raise recommended by Ryan. A substantial amount of highly contested testimony was admitted concerning the nature of and activities constituting this campaign of harassment" (4b).

Clearly, this is only one instance in which petitioners would have this Court set aside the findings of the jury. Certainly, there was there contested evidence, but the test for setting aside the determination is not what this or any other appellate tribunal would determine, but whether there is support for the jury's determination in the record. As we have demonstrated, the requisite proof is contained in the record.

Finally, petitioners misstate several facts as to the issue of damages, especially as relates to the issue of punitive damages.

Initially, petitioners make the unfounded assertion that the circuit court did not address this particular issue. However the opinion of the appellate court clearly shows that this precise issue was considered.

After the court reviewed the district court's charge on punitive damages, the court determined that:

> "A similar analysis applies to appellant's claim that there is insufficient evidence to support the jury's award for punitive damages. We recognize

> that punitive damages are an extraordinary sanction. We also recognize that an award of punitive damages is reversed only when it is so high as to shock the judicial conscience and constitute a denial of justice. *Zarcone v. Perry*, 572 F. 2d 52, 56-57 (2nd Cir. 1978) . . . In the case at bar the trial court charged the jury that it could award punitive damages only if appellants' acts were malicious, inspired by ill will, or in wanton and reckless disregard of the plaintiff's rights, but that such damages were only to be awarded for the most offensive conduct. The jury determined that appellants' conduct rose to that level. After examining the evidence bearing on damages, we decline to disturb its verdict." (15b).

In addition there is absolutely no indication that either the district court or the triers of fact tied the award of punitive damages to any of the other torts. It is clear that the court's charge separately enumerated the proper statutory criteria for a punitive damage award and did not relate this award to any other. Petitioners engage in sheer speculation when they claim that "the punitive damages unquestionably were considered by the jury with respect to both torts and not only one." Once again they improperly ask this Court to become the triers of fact.

Furthermore, petitioners claim that the issue as to lost wages is so speculative that no rational jury could have returned the verdict it did.

Again petitioners would impermissibly invade the province of the jury. Simply, they are not satisfied by the jury's determination, and would have it otherwise. As we previously pointed out, this is not the standard to be applied.

Petitioners also only detail negative aspects of Robert Hughes' life and completely ignore the basic reason why he was recommended for Special Assignment within the

Police Department. In one year Robert Hughes, while assigned to the Absence Control Unit of the Health Services Division saved the New York Police Department over three million dollars ($3,000,000.00) and reduced absenteeism of police officers (70). Continuing, petitioners ignore these affirmed findings of the jury. The triers of fact were told about the possibilities of obtaining the promotion, and they were likewise informed about the chance of not being given this promotion. The jury, however, credited the testimony favoring promotion. This very issue was addressed by the circuit court.

> "Another contested issue is whether damages allegedly arising from appellee's lost wages should have been submitted to the jury. Appellants argue that any such award would be based on pure speculation. Considerable evidence—which the jury was free to credit or discredit—was introduced to explain Hughes' failure to obtain the job of Sergeant Special Assignment with a salary and pension increase. Some of this proof suggested that Hughes' chances for promotion but for appellants' activities were good, some indicated that they were poor. Given that the jury was adequately charged with respect to both theories, resolution of this issue lay squarely with it." (15b)

We turn then to the various arguments raised by petitioners. Preliminarily, we noted that petitioners' first two arguments are addressed to the issue of jurisdiction as it arose before, during and after trial. We will, however, not address these under individual headings but will consider them together.

POINT I

The petition for writ of certiorari fails to raise a substantial question and in any event the courts below properly retained jurisdiction where the federal claim was paramount and where success on the federal claim is not the criterion for retaining jurisdiction.

Pursuant to Rule 17 of this Court, dealing with the considerations governing the grant or denial of certiorari, it is incumbent on petitioners to demonstrate the existence of a substantial question. According to this rule, the requested relief will be granted "only when there are special and important reasons therefor." (Rule 17.1). This Court has already determined that certiorari will be granted only in those cases involving principles the settlement of which is important to the public as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

We submit that the issues presented by this petition do not arise to the level of being substantial. All issues have been previously decided, and the resolution thereof certainly does not affect the public.

The issue of jurisdiction clearly is not substantial so as to merit review by this Court. In any event this very issue was raised on numerous instances in the courts below and rejected by each. The circuit court summarized this argument as being "appellants assert that the district court should have dismissed the federal claim—or not retained jurisdiction over it—and concurrently should have declined to exercise pendent jurisdiction over the state law claims." (7b). As this Court can observe, this is the identical argument previously asserted and rejected. Now it should likewise be rejected.

The opinion of the circuit court adequately addressed these issues and we quote liberally from that opinion:

> "Appellants urge that from the inception of this suit not even a "scintilla" of evidence supported appellee's Section 1983 claim that the PBA and Burns conspired with the New York City Police Department to violate appellee's civil rights. They argue that Hughes contrived the federal civil rights suit in order to invoke pendent jurisdiction over the state claims. Jurisdiction in this case was wholly premised on allegations that a conspiracy existed between private party appellants and the New York City Police Department, the only alleged state actor. Appellants contend Hughes' suit should have been dismissed when they originally made their 12(b)(6) pretrial motion because the complaint failed to allege facts sufficient to establish the conspiracy, or later during the trial when the transparency of the federal claim surfaced. The federal claims, appellants continue, should never have been submitted to the jury. Moreover, since the jury found that the Police Department was not liable, appellants argue that this proves jurisdiction never existed." (7b)

The court then correctly tested the initial claim that the district court should have granted the motion to dismiss as against the pleadings. The circuit court had no trouble whatsoever finding that the pleadings adequately stated a federal claim.

> "We turn next to appellants' argument that, as it became evident during the trial that the Section 1983 claim was without merit, the district court should have dismissed this claim and declined jurisdiction. Federal subject matter jurisdiction may be raised at any time during litigation and must be raised *sua sponte* by a federal court

when there is an indication that jurisdiction is lacking. (Citations omitted) . . .

For the district court to retain jurisdiction, a federal claim must be supported by some evidence. In this case, the record contains evidence of the Police Department's involvement in the alleged conspiracy to destroy appellee's career. The proof revealed detailed accounts of the Department's promotion system; the activity or inactivity of its Internal Affairs Division; and the knowledge, endorsement, and assistance by the Department to the PBA and Burns in their efforts. The evidence pointed to the relationship between the dissemination of accusations that blamed Hughes for Troia's death. This evidence was plainly sufficient for the district court to retain jurisdiction." (9b-10b).

Appellants' final jurisdictional point derives from the fact that the jury returned a verdict finding that they and the Police Department were not liable to Hughes on his cause of action under Section 1983. Somehow appellants believe that this demonstrates that federal jurisdiction was lacking *ab initio*. . . . Plainly, a federal claim need not be one guaranteed to suceed to gain entrance to a federal forum. In fact, appellants' argument that appellee's Section 1983 cause of action is jurisdictionally defective because of a negative jury verdict itself borders on being frivolous." (10b)

On other occasions this Court has had the opportunity to address this very issue. In *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593 (1926), it was declared that:

"Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the

> complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. In that event the claim of federal right under the statute, is a mere pretence and, in effect, is no claim at all. . . .
>
> Here, facts are set forth in a serious attempt to justify the claim that the federal statute has been violated; and while we hold them to be insufficient to sustain the claim, we are not prepared to say that they are so obviously insufficient as to cause it to be without color of merit and in effect, no claim at all. We think there is enough in the bill to call for the exercise of the jurisdiction of a federal court to decide, upon the merits the issue of the legal sufficiency of the allegations to make out the claim of federal right."

Later it was likewise determined in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 728 (1965) that:

> "It is true that the Section 303 [of the Labor Management Relations Act] claims ultimately failed and that the only recovery allowed respondent was on the state claim. We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried."

Moreover, the very argument asserted by petitioners that once the court loses power over the jurisdiction conferring claim, it may not entertain the pendent claims, has already been rejected by this Court. In *Rosado v. Wyman*, 397 U.S. 397 (1970), it was held that:

> "We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation by a conceptual approach that would require jurisdiction over the primary

claim at all stages as a prerequisite to resolution of the pendent claim."

Finally, the case primarily relied upon by petitioners to support their proposition that federal jurisdiction was improperly invoked is inapposite. In *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984), *modified* 748 F.2d 69, the federal claim was a mere appendage to the state claims, and not the paramount claim. Therefore it was determined that federal jurisdiction was improperly invoked.

In the facts now before this Court the federal claim advanced by Robert Hughes was substantial and not remote and minor as in *Dunton, supra.* In light of this, all courts recognized that federal jurisdiction was properly invoked and retained. The adverse determination by the jury has no bearing whatsover on this issue, and, in the words of the circuit court, is a frivolous argument.

POINT II

Petitioners in a futile attempt to invoke the jurisdiction of this Court now for the first time on this appeal miscast this action as being governed by the Norris-LaGuardia Act.

The practice of interjecting new matter on appeal to this Court has been condemned. *Ellis v. Dixon,* 349 U.S. 458 (1955). For the very first time petitioners raise the speculative claim that this action is governed by the Norris-LaGuardia Act (29 U.S.C. Section 106). Throughout the pre-trial, trial, post trial and intermediate appellate stages of this proceeding, no mention was ever made that this action was regulated by that statute. As a result no consideration was ever given to that statute, and no consideration should now be given by this Court.

However during the course of the trial of this matter, the district judge commented correctly that this is not a labor-management dispute (1113) and this conclusion was affirmed by the circuit court. The crux of the actionable wrong is that petitioners instigated a campaign of harassment directed against Robert Hughes based on the First Vice President's mistaken belief that Hughes was somehow responsible for the tragic death of his friend, Officer Troia. This mistaken belief misguided Burns and infected the PBA on their malicious vendetta.

Even if it was determined that the above-mentioned statute was applicable, we submit that there is sufficient evidence in the record to indicate that the PBA instigated and ratified these malicious acts.

As previously mentioned, there is certain testimony proving that the two investigators were hired by the PBA. This testimony was credited by the jury, and affirmed on appeal.

> "Hughes introduced evidence that the PBA hired two investigators to look into his involvement in the suicide and that the PBA told the investigators that it wanted him transferred out of the Health Services Division—any way you can—even if it meant framing him." (4b)

Support for the conclusion of the circuit court is in the record where Investigator Cox related that rather than being told to conduct a lawful investigation, he was given direct orders by petitioner Burns to, "whether it is factual or not, get something on this guy, I want him out." (308) Further, Cox admitted (344-357) that Burns demanded Cox destroy Hughes and to further "get him out any way you can, frame him, get him out of Health Services Division," and that, in fact, Cox was subsequently told by Burns that "the bum was out." (358).

Therefore, any claim that the PBA was undertaking a legitimate investigation or a legitimate grievance does not find support in the record. What is clearly borne out by the record is that the PBA sanctioned a malicious vendetta, which had as its sole motivation the revenge of the death of Officer Troia.

POINT III

The jury's assessment of damages was proper and reasonable and all awards have substantial compelling foundation in the record.

Petitioners seek to recast the verdict of the jury. To this end, they engage in unwarranted and unfounded speculation. Clearly, and as affirmed by the circuit court, there is substantial support in the record for the awards rendered by the jury.

Over forty years ago this Court in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), had occasion to remark:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the

court might draw a contrary inference or feel that another conclusion is more reasonable."

As corollary principles, it has been held that the issues of credibility of the various witnesses and the weight to be given to the evidence are solely within the realm of the triers of fact. *Helvering v. Johnson,* 104 F.2d 140, *aff'd* 308 U.S. 523 (1939). Furthermore, any disputed facts will not be set aside unless they are determined to be clearly erroneous. *Remington Rand Inc. v. Societe International Pour Participation Industrielles et Commerciales, S.A.,* 188 F.2d 1011, *cert. den.* 342 U.S. 832 (1957), *rehearing den.* 342 U.S. 889.

Petitioners engage in sheer speculation when they pronounce that the district court permitted the jury to award punitive damages on both of the torts presented to them. The district court properly charged the jury on the controlling principles for awarding punitive damages (14b). There is not one scintilla of proof to indicate that the jury married the award of punitive damages to both torts. The charge to the jury was separate and distinct as to punitive damages as was the verdict sheet.

Simply because petitioners are not satisfied with the verdict of the jury is an insufficient basis upon which to set aside this determination. Their dissatisfaction cannot, and does not translate into reversible error.

CONCLUSION

Since no substantial question has been raised by this petition, the order of the circuit court should be affirmed in all respects. Moreover, in light of the nature of this petition, costs should be awarded.

Respectfully submitted,

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